

U.S. Department of Labor

**Office of Administrative Law Judges
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MAILED: 12/07/2000

IN THE MATTER OF:

Hedwig V. Jordan
(Widow of Eugene G. Jordan)
Claimant

Against

General Dynamics Corporation
Employer/Self-Insurer

and

Director, Office of Workers'
Compensation Programs, United
States Department of Labor
Party-in-Interest

* * * * *

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Lance G. Proctor, Esq.
Peter D. Quay, Esq.
For the Employer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 26, 2000 in New London, Connecticut,

at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 10	Attorney Kelly's letter filing the parties' supplemental stipulations	05/30/00
RX 13	Attorney Proctor's letter withdrawing Section 8(f) as an issue	05/30/00
CX 11	Attorney Kelly's letter filing the	06/01/00
CX 12	May 17, 2000 supplemental report of Dr. David G. Kern	06/01/00
CX 13	Attorney Kelly's letter filing her	07/10/00
CX 14	Fee Petition	07/10/00
CX 15	Attorney Kelly's letter filing her	07/14/00
CX 16	Supplemental Fee Petition	07/14/00
RX 14	Attorney Quay's letter interposing no objections to the fee petition	07/14/00
RX 15	Attorney Quay's letter interposing no objections to the supplemental fee petition	07/14/00

The record was closed on July 14, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Decedent and the Employer were in an employee-employer relationship at the relevant times.
3. On March 27, 1990, Claimant alleges that her husband suffered an injury in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury and death in a timely fashion.
5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.
6. The parties attended an informal conference on January 29, 1997.
7. The applicable average weekly wage is \$548.98, the average weekly wage as established in a prior decision in this case. (CX 10)
8. The Employer has paid no benefits on the claim for Death Benefits.

The unresolved issues in this proceeding are:

1. Whether Decedent's death was causally related to his maritime employment and his work-related injury for which he received permanent total benefits from April 24, 1990 through his death on April 21, 1996.
2. If so, whether Claimant is entitled to an award of Death Benefits and interest on all past due benefits.
3. Decedent's average weekly wage as of the date of injury on March 27, 1990.
4. The applicability of Section 8(f) of the Act has been withdrawn by the Employer. (RX 13)

PROCEDURAL HISTORY

This Administrative Law Judge, by Decision and Order Awarding Benefits dated August 1, 1994, (CX 1-5 through 1-21), concluded that Eugene G. Jordan's ("Decedent" herein) maritime

employment at the Employer's shipyard and his daily use of pneumatic tools as a sheet metal mechanic had resulted in bilateral carpal tunnel syndrom, that he began to experience shortness of breath in the mid-1980s, a condition exacerbated by his physically-demanding shipyard work and that he had to stop working on April 24, 1990 because of his multiple medical problems. Accordingly, Decedent was awarded, **inter alia**, compensation benefits for his permanent total disability, based upon his average weekly wage of \$548.98, such compensation to commence on April 24, 1990. The Employer was afforded the limiting provision of Section 8(f) of the Act and the Special Fund assumed payment of such benefits after the Employer paid 104 weeks of permanent benefits.

The Findings of Fact and Conclusions of Law made in the August 1, 1994 decision (CX 1) are binding upon the parties by virtue of **Res Judicata** and Collateral Estoppel as said decision is now final, and those findings and conclusions are incorporated herein by reference and as if stated **in extenso** and they will be reiterated herein only for purposes of clarity and to resolve the issues presented herein.

Summary of the Evidence

Decedent's multiple medical problems are best summarized by the February 12, 1991 report of Dr. S. Pearce Browning, III, a surgeon whose practice is limited to orthopedics and hands. Dr. Browning, who saw Decedent at the Employer's request, stated as follows in his report to the Employer's workers' compensation adjuster (RX 12):

"At your request, I saw Mr. Eugene Jordan in the office on 2/8/91 or independent medical examination. Mr. Jordan has worked in the sheet metal shop at Electric Boat. He started work at Electric Boat on April 21, 1980. Before that he worked as a maintenance man in a meat packing plant. While he was in the meat packing plant, he had no specific trouble with cold in the refrigerated areas. I inquired specifically as to whether he had used air driven tools or vibrating tools before he came to Electric Boat, and he had not. He has used air driven tools as a sheet metal worker. These included air driven drills, cutting shears, and air driven grinders with which he ground welds smooth.

He started to develop discomfort in both hands. He has had diabetes for a least 2 years and takes Micronase. Her personal medical physician is Dr. Padayhad on Tollgate Road in Warwick Rhode Island. He last worked around 9/15/90 although he has worked a little bit in between.

He has lungs problems which go back to 1988 and earlier and he was short of breath. He was initially followed by one physician and eventually changed to Dr. Padayhag. He apparently has COPD. He does not have with him any laboratory values for same. He apparently had some blood gases done a week or so ago, but there are no pulmonary function studies done.

Dr. Infantolino did carpal tunnel releases on both sides; left side was done on 12/1/89 and the right side done 9/15/89. The left side has done quite well - the right side has not. He continues to have pain and discomfort in the right hand and it is particularly sensitive to cold water. He has poor sensation and he tends to drop things. Sensory deprivation is limited to the median nerve and it does not involve the ulnar nerve area in the right hand. The sensation in the left hand to pinwheel and vibration is normal. the grasp is diminished - right 48; left, 93. Pinch - right, 9 fading to 6; left 12.5. He is a bit tender over the wrist and one can feel a click in the wrist. He had standard wrist films of the right hand with him plus he had a bone scan which showed a good deal of uptake in the joint between the radius and scaphoid and other carpal bones. On the right side, the flexion test and Tinel's sign are weakly positive; on the left, they are not.

So, in summary, we have a 60 year old sheet metal worker, height, 5'10", weight, 226 pounds, who has had bilateral carpal tunnel releases. The left has done well, the right has not. In his medical background are included exposure to vibration tools, diabetes and chronic COPD.

I looked at Mr. Jordan's situation carefully. I think I would recommend that the Conduction Studies should be repeated at the right wrist. The outcome in the right wrist has not been that good and it is this that disables him. I am not sure whether this is due to some continuing problems with compression or diabetes or vibration disease. The latter two could very well account for why he hasn't done that much better. He does have cold sensitivity and pain the fingers from cold but he has not, as yet, developed classic Raynaud's.

My recommendation would be to repeat the Conduction Studies and carefully consider the possibility of re-exploring the right wrist. In the left hand, I think he has reached a point of maximum medical improvement and I would assign a rating of 5% permanent partial impairment of the left non-master hand. On the right side, I would want to see the outcome of the Conduction Studies before assigning a rating and if surgery is done, a final rating should wait a year. You could, however, pay him 5% permanent partial of the right master hand on account without prejudice because I am sure that the eventual outcome will be significantly larger.

At this point, I think that Mr. Jordan's other problems have created a situation in which I would recommend you file for Section 8(f) relief. In particular, I believe that his general overall situation and particularly his diabetes, affect his hands. Secondly, I think the extent of his COPD is enough and was known to be present prior to his injury so I think that the outcome is materially and substantially worse. Because of the COPD and his diabetes, I would suggest that you get complete records and the simplest thing in Mr. Jordan's case, I think, is to apply for Section 8(f) relief. I suspect when you get the pulmonary function studies that they will be very significantly impaired. At the present moment, I think he has enough sensory impairment in the right hand so that working with power tools and doing sheet metal work is not an appropriate or safe thing for either he or the company.

I also attach a copy of his medication schedule which he gave me. He is off the Voltaren and cannot remember what it was for, but the rest of the medications, Proventil, Ventolin, Theo-Dur, Alupent and Prednisone are for the lungs, and the Micronase is for the diabetes," according to the doctor.

Decedent's medical records reflect numerous admissions to the Kent County Memorial Hospital in Warwick, Rhode Island for evaluation and treatment of chronic obstructive pulmonary disease (COPD), manifested by symptoms such as shortness of breath and congestion, as well as acute bronchitis. The treatment usually consisted of Albuterol aerosol therapy, *i.e.*, Solu-Medrol. Decedent's "history of diabetes mellitus (was) controlled with Micronase." The discharge diagnoses usually included:

1. Acute bronchitis;
2. Chronic obstructive pulmonary disease;
3. Diabetes Mellitus.

In this regard, **see** CX 3 - CX 5; RX 8 - RX 9. I note that the September 8, 1989 **Discharge Summary** indicates that Decedent "was seen by Dr. Infantolino for carpal tunnel syndrome on the right and ganglion" and that he "was scheduled for surgery on September 15, 1989." (RX 9-19)

Dr. Joseph Padayhag read Decedent's April 7, 1989 pulmonary function studies as showing (RX 10-1):

IMPRESSION: This pulmonary function study is consistent with chronic obstructive pulmonary disease of moderate impairment. There is an adverse reaction of the airways to bronchodilator challenge, as evidenced by the decrease in the FEV1 following

bronchodilator administration. Follow up pulmonary function study is recommended in three to six months to determine if the obstructive defect will improve following his acute clinical episode.

As of September 12, 1988, Dr. Fritz Pluviose reported as follows (RX 9-10): **"The patient is a known case of advanced (sic) emphysema and he still smokes."** (Emphasis added) Decedent was hospitalized for four (4) days and Dr. Pluviose's Discharge Diagnosis was "(e)xacerbation of chronic obstructive lung disease." (**Id.**) Dr. Pluviose diagnosed advanced chronic obstructive lung disease "as of August 11, 1989." (RX 9-16)

As of August 7, 1989 Dr. R. Mals, a radiologist, reported that Decedent's x-rays, taken that date and when compared with his x-rays four (4) days earlier, showed "a slight increase in perihilar interstitial prominence manifested by peribronchial cuffing." (RX 9)

Dr. Padayhag gave the following discharge diagnoses on March 17, 1990 (RX 9-29) (Emphasis added):

1. **Pneumonia;**
2. **Hemophilus parainfluenzae;**
3. **COPD; and**
4. **Carpal tunnel syndrome.**

Dr. Joseph P. Padayhag issued the following disability slip on January 4, 1990 (RX 10-2):

Please be advised the Mr. Eugene Jordan is under my medical care for Chronic Obstructive Pulmonary Disease. He experiences shortness of breath on minimal exertion such as walking any distance, walking in cold weather ow walking up a hill or incline. Please take these factors into consideration when he requests parking or transportation privileges.
(Emphasis added)

I note that on February 18, 1988 Dr. Pluviose had issued a similar disability slip (RX 11) (Emphasis added):

To Whom It May Concern:
Because of chronic obstructive pulmonary disease of moderately severe degree, my patient, Eugene Jordan, cannot walk for extended distances. I therefore suggest that he ride whenever possible.

The Employer also referred Decedent for a pulmonary examination at the Memorial Hospital of Rhode Island and David G. Kern, M.D., M.O.H., Director, Occupational Health Service, sent the following letter to the Employer on May 21, 1991 (CX 2):

"As requested, I examined Mr. Jordan at the Memorial Hospital of Rhode Island Occupational Health Service on May 20, 1991. Mr. Jordan had been referred for a respiratory disability evaluation.

"I found the patient to be a 61 year old disabled sheet metal worker who left school in 1946 with his only prior employment being farm work. From 1946-47, he worked in an automobile dealership where he pumped gas, cleaned parts, and performed an average of one clutch or brake job per week. From 1947-52, he served in the United States Army both as an ambulance driver/medic and as an ordnance worker for 2 ½ years. In the latter position, he performed about one brake or clutch job per month. From 1953-56, he worked as an auto mechanic doing about two brake or clutch jobs per week. From 1956-69, he worked in residential plumbing and removed a fair number of boilers covered with asbestos insulation. During this period, he also insulated two boilers with asbestos. From 1959-63, he owned his own gasoline station and performed about two clutch/brake jobs per weeks. From 1963-67, he worked as a machine operator at a woodworking shop with substantial exposure to saw dust, epoxy resins and fiberglass. From 1967-75, he worked as a supervisor of maintenance at Capitol Industrial Center. From 1975-80, he performed as a custodian at Newton Packing Company where he was responsible for steam cleaning the meat packing areas and carrying materials into the freezers. From 1980 until approximately 1988, he worked as a sheet metal worker at the Electric Boat Shipyard. He worked in both the metal shop and on-board metal units. On a regular basis, he would use a grinding machine which created extremely dusty conditions. He also, fairly regularly, worked along side welders. Although he usually wore an air purifying half-face respirator during grinding operations and when welders were working in his area, he nevertheless found the exposures irritating to his nose and throat. When working on-board ship, he was frequently in confined spaces.

"A former 1 pack per day smoker for 42 years, Mr. Jordan discontinued all tobacco use in 1990. Without prior history of chest disease, respiratory symptoms, or history of personal or familial atopic illness, the patient began to experience a chronic productive cough as well as dyspnea and wheezing on effort in 1987. He otherwise remained well without paroxysmal symptoms until the late summer of 1988 when for unexplained reasons he fairly suddenly developed a marked increase in

shortness of breath leading to hospitalization. He was discharged with a diagnosis of chronic obstructive pulmonary disease and treated with multiple bronchodilators. Over the subsequent year, he was rehospitalized about eight times. During this time, the patient also was diagnosed as having diabetes mellitus. The patient also developed bilateral carpal tunnel syndrome and underwent surgical release in the fall of 1989. Over the last three years, the patient's respiratory symptoms have progressively worsened such that he now experiences grade IV dyspnea (shortness of breath on any effort whatsoever), chronic productive daily cough, and wheezing with effort... Current medications include inhaled beta-agonists by both meter-dose inhaler and home nebulizer, prednisone 10 mg daily, Theodur 1200 qd, an expectorant, Seclor 250 mg tid for increasing sputum, Micronase 5 mg bid, and Volnaren 75 mg tid. The patient also carries the diagnosis of bilateral carpal tunnel syndrome, status-post surgical release...

"Pulmonary function revealed an FEV1 1.17 liters (35% predicted)... The results are consistent with fairly severe emphysema with a substantial improvement following the inhalation of inhaled bronchodilator. The results are fairly similar to those the patient produced in 1989 and 1990 and are consistent with pulmonary emphysema as well as a fairly substantial component of reversible airway obstruction.

"According to the American Medical Association **Guide to the Evaluation of Permanent Impairment** (Third Edition), the patient should be considered to have a Class V respiratory impairment with a 60% impairment. Although the patient's former smoking habit was mainly responsible for his respiratory disability, I believe it is reasonable to conclude that his exposure at Electric Boat to welding fumes and metal grinding dust contributed to his chronic bronchitis (chronic daily productive cough) and his fixed airway obstruction. However, given the patient's regular use of a respirator and, in spite of the fact that he nevertheless continues to experience mild irritant symptoms while using a respirator, I believe that his shipyard exposures minimally contributed. As noted above, the patient has bilateral carpal tunnel syndrome, a condition which would render his overall disability materially and substantially greater than it would be otherwise. If I can be of further assistance, please do not hesitate to contact me."

In his supplemental report of September 15, 1993 to the Employer, Dr. Kern stated as follows (RX 5) (Emphasis added):

As requested, I am writing to clarify my previous letters of May 22, 1992 and March 2, 1993. It is my opinion that Mr. Jordan's chronic obstructive pulmonary disease is not the sole basis of his current

disability. Rather, his bilateral carpal tunnel syndrome and diabetes mellitus have substantially contributed (to such disability).

Dr. Kern reiterated his opinions at his February 22, 1994 deposition, the transcript of which is in evidence as RX 4.

In his second supplemental report, Dr. Kern, as of May 17, 2000 stated as follows (CX 12):

"As requested, I reviewed Mr. Jordan's medical records in order to offer a medicolegal opinion as to whether his exposure to lung irritants at work contributed to his death.

"As you know, I examined Mr. Jordan at the Memorial Hospital of Rhode Island on May 20, 1991, and detailed the results of my evaluation in a letter written to Ms. Nancy Wells of National Employers Company on May 21, 1991. At the time, I concluded that: (1) the patient had a Class V respiratory impairment with a 60% impairment according to the **American Medical Association Guide to the Evaluation of Permanent Impairment** (Third Edition), and (2) while the patient's former smoking habit was mainly responsible for his respiratory disability, his exposure at Electric Boat to welding fumes and metal grinding dust contributed albeit minimally to his chronic bronchitis and his fixed airway obstruction.

"In March 1996, the patient was hospitalized with a *Pseudomonas aeruginosa* bilobar pneumonia. Following a three-week hospitalization, he was discharged home only to be readmitted the following day. On readmission, his gas exchange was not much worse than at discharge. However, his CBC revealed 60% bands (immature neutrophilic white blood cells) indicating the almost certain presence of bacteremia (blood-borne infection). The infectious disease consultant recommended different antibiotics than those that had been used appropriately during the prior hospitalization. The newly prescribed antibiotics were well chosen in that the patient's sputum subsequently was shown to contain two strains of *Pseudomonas aeruginosa*, one of which was resistant to the previously used antibiotics but sensitive to the newly prescribed antibiotics. Nevertheless, the patient died within 24 hours presumably of overwhelming sepsis.

"Given my previous conclusion that the patient's workplace exposures had contributed both to his chronic bronchitis and to his fixed obstructive airways disease (emphysema), the fact that patients with severe lung disease are at high risk of developing *Pseudomonas* pneumonias, and that patients with severe lung disease are less likely to survive such infections, I believe to a reasonable degree of medical certainty that the patient's

workplace exposures at Electric Boat contributed to his death."

Decedent's continuing exposure to injurious pulmonary stimuli between April 21, 1980 and April 23, 1990 aggravated and exacerbated his breathing problems and such worsening is reported in the reports of Dr. Joseph Padayhag (RX 9, RX 10), Dr. Robert E. Baute (RX 8), Dr. Pluviose (RX 11), Dr. Browning (RX 12) and Dr. Kern. (CX 2, RX 4) As noted, Decedent continued to be hospitalized at Kent County Memorial Hospital for evaluation and treatment of his pulmonary problems after he stopped working. On March 31, 1996 Decedent was hospitalized because of "difficulty breathing" and he was discharged on April 19, 1996. The Discharge Summary of Dr. Charles F. Samson includes these (CX 3-4):

FINAL DIAGNOSES:

1. Right lung pneumonia with Pseudomonas pneumonia.
2. Chronic obstructive pulmonary disease in chronic stage with persistent hyperemia.
3. Insulin dependent diabetes mellitus.
4. Hematuria.
5. Peripheral edema.

Decedent was discharged on home care as "improved" but he was home only one day, experienced acute breathing problems as well as leg weakness and was readmitted to the hospital on April 21, 1996. (CX 3-10) Decedent's condition rapidly deteriorated and he passed away on April 21, 1996, at 4:17 a.m., and Dr. Hamayoung Shojamanesh has certified as the immediate cause of death "Sepsis" due to or as a consequence of pseudomonas pneumonia. (CX 6) Eugene Gilbert Jordan ("Decedent") married Hedwig Veronica Tomasik ("Claimant") on February 7, 1953 (CX 8) and Claimant was living with Decedent at the time of his death. (TR 26-37) Funeral expenses exceeded \$3,000.00. (CX 7)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain**

Trimmers Association, Inc., 390 U.S. 459 (1968), reh. denied, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, supra, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), rev'g **Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have

caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita, supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier, supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In this proceeding Claimant alleges that her husband's death was due, in part, to the work-related injury for which he had been awarded, and was paid, permanent total disability benefits, as indicated above (CX 1), and, in support of such claim for Death Benefits, Claimant has offered the report of Dr. Kern wherein the doctor states as follows (CX 12):

"As requested, I reviewed Mr. Jordan's medical records in order to offer a medicolegal opinion as to whether his exposure to lung irritants at work contributed to his death.

"As you know, I examined Mr. Jordan at the Memorial Hospital of Rhode Island on May 20, 1991, and detailed the results of my evaluation in a letter written to Ms. Nancy Wells of National Employers Company on May 21, 1991. At the time, I concluded that: (1) the patient had a Class V respiratory impairment with a 60% impairment according to the **American Medical Association Guide to the Evaluation of Permanent Impairment** (Third Edition), and (2) while the patient's former smoking habit was mainly responsible for his respiratory disability, his exposure at Electric Boat to welding fumes and metal grinding dust contributed albeit minimally to his chronic bronchitis and his fixed airway obstruction.

"In March 1996, the patient was hospitalized with a *Pseudomonas aeruginosa bilobar pneumonia*. Following a three-week hospitalization, he was discharged home only to be readmitted the following day. On readmission, his gas exchange was not much worse than at discharge. However, his CBC revealed 60% bands (immature neutrophilic white blood cells) indicating the almost certain presence of bacteremia (blood-borne infection). The infectious disease consultant recommended different antibiotics than those that had been used appropriately during the prior hospitalization. The newly prescribed antibiotics were well chosen in that the patient's sputum subsequently was shown to contain two strains of *Pseudomonas aeruginosa*, one of which was resistant to the previously used antibiotics but sensitive to the newly prescribed antibiotics. Nevertheless, the patient died within 24 hours presumably of overwhelming sepsis.

"Given my previous conclusion that the patient's workplace exposures had contributed both to his chronic bronchitis and to his fixed obstructive airways disease (emphasema), the fact that patients with severe lung disease are at high risk of developing *Pseudomonas pneumonias*, and that patients with severe lung disease are less likely to survive such infections, I believe to a reasonable degree of medical certainty that the patient's workplace exposures at Electric Boat contributed to his death."

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See, e.g., Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See, e.g., Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical

harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See, e.g., Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, I have already found and concluded that the harm to Decedent's bodily frame, **i.e.**, his bilateral carpal tunnel syndrome, resulted from working conditions at the Employer's shipyard. The Employer introduced no evidence severing the connection between such harm and his maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be

discussed and, as noted, Decedent was awarded permanent total disability benefits commencing on April 24, 1990 and such benefits continued until his death on April 21, 1996. (CX 1)

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), rev'g **Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), aff'd sub nom. **Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (Decision and Order on Remand); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of

reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Decedent's COPD was caused, in part, by his maritime employment and the exposures to injurious pulmonary stimuli he experienced at the Employer's shipyard, that the date of injury is March 27, 1990, that the Employer had timely notice of such pulmonary injury and filed the appropriate first injury reports, Form LS-202, dated May 1, 1990 (RX 1), that the Employer timely controverted Claimant's entitlement to benefits (RX 2) on or about May 8, 1990 and that Decedent timely filed for benefits once that dispute arose between the parties. In fact, the principal issues are whether Decedent died of a work-related injury and, if so, the nature and extent of his disability, issues I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Decedent has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141

(1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movable Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Decedent has established he could return to any work after he stopped working. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Decedent's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum

medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell, supra**. See also **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition.

Watson v. Gulf Stevedore Corp., supra.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985). The parties have stipulated, and this closed record corroborates, that Decedent was an involuntary retiree and that any benefits awarded to his surviving widow shall be based upon the average weekly wage established in Decedent's claim for benefits, or \$548.98. (CX 10)

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom.**

Travelers Insurance Co. v. Marshall, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. See **Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding \$3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was \$1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to \$3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than \$105 nor less than \$27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. See **Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), *aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), *aff'g* 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), *aff'g sub nom. Rasmussen v. GEO Control, Inc.*, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of \$532 per week, two-thirds of the employee's \$798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on April 22, 1996, the day after her husband's death, based upon the Decedent's average weekly wage \$548.98 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from his work-related pulmonary problems, *i.e.*, his COPD, according to Dr. Kern. (CX 12) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which he had been receiving permanent total disability benefits until his death on April 21, 1996.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate

shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits. (TR) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

As noted above, the Employer has withdrawn its petition for Section 8(f) relief with reference to the Claimant's claim for Death Benefits. (RX 13)

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed fee applications on July 10, 2000 (CX 14) and July 14, 2000 (CX 16), concerning services rendered and costs incurred in representing Claimant between January 31, 1997 and June 7, 2000. Attorney Carolyn P. Kelly seeks a fee of \$3,808.84 (including expenses) based on attorney time and paralegal time at various hourly rates.

The Employer has accepted the requested attorney's fee as reasonable in view of the benefits obtained and the hourly rate charged. (RX 14, RX 15)

In accordance with established practice, I will consider only those services rendered and costs incurred after January 29, 1997, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Employer's acceptance of the requested fee, I find a legal fee of \$3,808.84 (including expenses of \$633.84) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay Decedent's widow, Hedwig Jordan, ("Claimant"), Death Benefits from April 22, 1996, based upon the average weekly wage of \$548.98, in accordance with Section 9 of the Act, and such benefits shall

continue for as long as she is eligible therefor.

2. The Employer shall reimburse or pay Claimant reasonable funeral expenses of \$3,000.00, pursuant to Section 9(a) of the Act. (CX 7)

3. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

4. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of \$3,808.84 (including expenses) as a reasonable fee for representing Claimant herein after January 29, 1997 before the Office of Administrative Law Judges and between January 31, 1997 and June 7, 2000.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl